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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**
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6 IVELISSE BISHCOFF,
7 Plaintiff,
8 v.
9 KILOLO KIJAKAZI,
10 Defendant.

Case No. 2:21-cv-01707-NJK

ORDER

[Docket Nos. 18, 20]

11 This case involves judicial review of administrative action by the Commissioner of Social
12 Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits and
13 supplemental security income pursuant to Titles II and XVI of the Social Security Act. Currently
14 before the Court is Plaintiff’s Motion for Reversal and/or Remand. Docket No. 18. The
15 Commissioner filed a response in opposition and a cross-motion to affirm. Docket Nos. 20, 22.
16 Plaintiff filed a reply. Docket No. 23. The parties consented to resolution of this matter by the
17 undersigned magistrate judge. *See* Docket No. 3.

18 **I. STANDARDS**

19 **A. Disability Evaluation Process**

20 The standard for determining disability is whether a social security claimant has an
21 “inability to engage in any substantial gainful activity by reason of any medically determinable
22 physical or mental impairment which can be expected . . . to last for a continuous period of not
23 less than 12 months.” 42 U.S.C. § 423(d)(1)(A); *see also* 42 U.S.C. § 1382c(3)(A). The disability
24 determination is made by following a five-step sequential evaluation process. *Bowen v. Yuckert*,
25 482 U.S. 137, 140 (1987) (citing 20 C.F.R. §§ 404.1520, 416.920). The first step addresses
26 whether the claimant is currently engaging in substantial gainful activity. 20 C.F.R. §§

1 404.1520(b), 416.920(b).¹ The second step addresses whether the claimant has a medically
 2 determinable impairment that is severe or a combination of impairments that significantly limits
 3 basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). The third step addresses whether the
 4 claimant's impairments or combination of impairments meet or medically equal the criteria of an
 5 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d),
 6 404.1525, 404.1526, 416.920(d), 416.925, 416.926. There is then a determination of the
 7 claimant's residual functional capacity, which assesses the claimant's ability to do physical and
 8 mental work-related activities. 20 C.F.R. §§ 404.1520(e), 416.920(e). The fourth step addresses
 9 whether the claimant has the residual functional capacity to perform past relevant work. 20 C.F.R.
 10 §§ 404.1520(f), 416.920(f). The fifth step addresses whether the claimant is able to do other work
 11 considering the residual functional capacity, age, education, and work experience. 20 C.F.R. §§
 12 404.1520(g), 416.920(g).

13 **B. Judicial Review**

14 After exhausting the administrative process, a claimant may seek judicial review of a
 15 decision denying social security benefits. 42 U.S.C. § 405(g). The Court must uphold a decision
 16 denying benefits if the proper legal standard was applied and there is substantial evidence in the
 17 record as a whole to support the decision. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir. 2005).
 18 Substantial evidence is “more than a mere scintilla,” which equates to “such relevant evidence as
 19 a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, ____
 20 U.S. ___, 139 S.Ct. 1148, 1154 (2019). “[T]he threshold for such evidentiary sufficiency is not
 21 high.” *Id.*

22 **II. BACKGROUND**

23 **A. Procedural History**

24 On April 16, 2019, Plaintiff filed applications for disability insurance benefits, and
 25 supplemental security income, with an onset date of January 1, 2013. *See, e.g.*, Administrative
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28 ¹ The five-step process is largely the same for both Title II and Title XVI claims. For a
 Title II claim, however, a claimant must also meet insurance requirements. 20 C.F.R. § 404.130.

1 Record (“A.R.”) 366-375.² The Commissioner denied Plaintiff’s claims initially and on
 2 reconsideration. A.R. 171-270. *See also* A.R. 278-282, 284-287. On May 5, 2020, Plaintiff filed
 3 a request for a hearing before an administrative law judge. A.R. 303-304. On January 7, 2021,
 4 Plaintiff, Plaintiff’s representative, and a vocational expert appeared for a hearing before ALJ
 5 David K. Gatto. *See* A.R. 57-77. On February 3, 2021, the ALJ issued an unfavorable decision
 6 finding that Plaintiff had not been under a disability through the date of the decision. A.R. 36-50.
 7 On August 4, 2021, the ALJ’s decision became the final decision of the Commissioner when the
 8 Appeals Council denied Plaintiff’s request for review. A.R. 1-6.

9 On September 15, 2021, Plaintiff commenced this action for judicial review. Docket No.
 10 1.

11 B. The Decision Below

12 The ALJ’s decision followed the five-step sequential evaluation process set forth in 20
 13 C.F.R. §§ 404.1520 and 416.920 A.R. 36-50. At step one, the ALJ found that Plaintiff met the
 14 insured status requirements through June 30, 2016, and has not engaged in substantial gainful
 15 activity since the alleged onset date. A.R. 39. At step two, the ALJ found that Plaintiff has the
 16 following severe impairments: hypertension, fibromyalgia, spinal disorder, right shoulder
 17 disorder, carpal tunnel syndrome, sensorineural hearing loss, diabetes mellitus, bipolar II disorder,
 18 psychotic disorder, depressive disorder, anxiety disorder, and somatic symptom disorder. A.R. 39.
 19 At step three, the ALJ found that Plaintiff does not have an impairment or combination of
 20 impairments that meets or medically equals the severity of one of the listed impairments in 20
 21 C.F.R. Part 404, Subpart P, Appendix 1. A.R. 39-42. The ALJ found that Plaintiff has the residual
 22 functional capacity to

23 perform light work as defined in 20 CFR 404.1567(b) and
 24 416.967(b) with no climbing of ladders, ropes, or scaffolds; frequent
 25 balancing; occasional stooping, kneeling, crouching, and crawling;
 26 frequent handling and fingering; frequent pushing and pulling with
 the right arm; no exposure to temperature extremes, vibrations,
 wetness, or hazards such as unprotected heights or dangerous
 moving machinery; and, due to hearing loss, the work would be

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 28 ² Plaintiff had filed four previous applications for benefits that were denied. *See* A.R. 172.
 As to the onset date for the present applications, at the hearing in front of the administrative law
 judge, Plaintiff amended the alleged onset date for her applications to May 1, 2016. A.R. 36, 60.

1 performed in an environment with a moderate noise level, such as
 2 found in an office or retail setting. Despite mental impairment, the
 3 claimant would still be able to understand, carry out, and remember
 4 work instructions, use judgment to make work related decisions, and
 could occasionally interact with supervisors, coworkers, and
 members of the general public in brief, casual encounters, and adapt
 to occasional, routine change in a work setting to perform simple
 work tasks.

5 A.R. 42. *See also* A.R. 42-48. At step four, the ALJ found Plaintiff is unable to perform any past
 6 relevant work as a cashier, cashier II, or change person. A.R. 48. At step five, the ALJ found that
 7 jobs exist in significant numbers in the national economy that Plaintiff can perform based on her
 8 age, education, work experience, and residual functional capacity. A.R. 48-50. In doing so, the
 9 ALJ defined Plaintiff as a younger individual aged 18-49 at the time of the alleged disability onset
 10 date, and as having at least a high school education. A.R. 48. The ALJ found the transferability
 11 of job skills to be immaterial. AR. 49. The ALJ considered the Medical-Vocational Rules, which
 12 provide a framework for finding Plaintiff not disabled, along with vocational expert testimony that
 13 an individual with the same residual functional capacity and vocational factors could perform work
 14 as a housekeeping cleaner and merchandise maker. A.R. 49-50.

15 Based on these findings, the ALJ found Plaintiff not disabled through the date of the
 16 decision. A.R. 50.

17 **III. ANALYSIS**

18 Plaintiff raises a single issue on appeal: that the ALJ erred in the weight he accorded Dr.
 19 Short's opinions about Plaintiff's mental limitations, resulting in an improper residual functional
 20 capacity determination. Docket No. 18 at 6-9. Plaintiff submits that the ALJ improperly rejected
 21 part of Dr. Short's opinion because the ALJ did not state a logical and rational basis for discounting
 22 Dr. Short's assessments. *Id.* Specifically, Plaintiff submits that the ALJ erred by expressing
 23 concern that Dr. Short used the word "probably" in expressing opinions as to Plaintiff's capability
 24 and, therefore, found his opinion only mostly persuasive. *Id.* at 7-8. Plaintiff submits that the ALJ
 25 needed to articulate a specific reason beyond this concern for discrediting Dr. Short's opinion that
 26 Plaintiff could probably not sustain detailed tasks without special supervision and that, because he
 27 did not, the residual functional capacity the ALJ found and the questions he posed to the vocational
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1 expert were improper. *Id.* at 8. Plaintiff asks the Court to remand the case for further
 2 administrative proceedings and to direct the ALJ to credit Dr. Short's opinions. *Id.* at 9.

3 In response, the Commissioner submits that the ALJ properly assessed Dr. Short's opinion
 4 and that the weight he afforded it was supported by substantial evidence. Docket No. 20 at 6-13.
 5 The Commissioner submits that the changes to the Social Security regulations, which went into
 6 effect prior to Plaintiff filing her application for benefits, drastically change the manner and
 7 method in which ALJs consider the medical and opinion evidence before them. *Id.* at 6-10. The
 8 Commissioner further submits that the ALJ properly articulated the consistency and supportability
 9 factors required of him when assessing the weight he gave Dr. Short's opinion. *Id.* at 10-11. The
 10 Commissioner submits that the ALJ's determinations as to the weight of Dr. Short's opinion is
 11 supported by substantial evidence because other evidence submitted for consideration supports the
 12 ALJ's findings about Plaintiff's mental limitations and because the ALJ properly considered other
 13 opinions, which Plaintiff does not contest, that contained contradictory findings while crafting the
 14 residual functional capacity. *Id.* at 11-13. The Commissioner asks the Court to affirm the ALJ's
 15 determination that Plaintiff was not disabled and to deny Plaintiff's request for remand. *Id.* at 13.

16 In reply, Plaintiff submits that the ALJ should have provided an articulated reasoning for
 17 the weight he afforded Dr. Short's opinion, particularly since the ALJ was weighing the opinion
 18 evidence of two experts, Dr. Short and Dr. Foerster. Docket No. 23 at 3-4. Plaintiff asks the Court
 19 to reverse the ALJ's decision and remand the case for further administrative proceedings. *Id.* at 4.

20 The Social Security regulations were updated and amended in 2017. The new agency
 21 regulations, effective March 27, 2017, apply to Plaintiff's case. Under these new regulations, the
 22 ALJ will no longer "give any specific evidentiary weight, including controlling weight, to any
 23 medical opinion(s)..." 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Instead, the ALJ must consider
 24 and evaluate the persuasiveness of all medical opinions or prior administrative medical findings
 25 from medical sources. *Id.* When evaluating the persuasiveness of medical opinions, the ALJ must
 26 consider factors articulated in the regulations, including supportability, consistency, relationship
 27 with the claimant, specialization, and "other factors that tend to support or contradict a medical
 28 opinion or prior administrative medical finding," including but not limited to "evidence showing

1 a medical source has familiarity with the other evidence in the claim or an understanding of our
 2 disability program's policies and evidentiary requirements." 20 C.F.R. §§ 404.1520c(c)(1)-(5),
 3 416.920c(b)(2). The two most important factors in this assessment are consistency and
 4 supportability and the ALJ must explain how both factors were considered. 20 C.F.R. §§
 5 404.1520c(b)(2), 416.920c(b)(2). The ALJ can, but is not required to, discuss how the other factors
 6 were considered. *Id.* If the medical opinion includes evidence on an issue reserved to the
 7 Commissioner, the ALJ need not provide an analysis of the evidence in his decision, even in the
 8 discussions required by 20 C.F.R. §§ 404.1520c, 416.920c. *See* 20 C.F.R. §§ 404.1520b(c)(3),
 9 415.920b(c)(3).

10 Under the new regulations, a medical opinion is "a statement from a medical source about
 11 what you can still do despite your impairment(s) and whether you have one or more impairment-
 12 related limitations or restrictions in abilities." 20 C.F.R. § 404.1513(a)(2). Judgments about "the
 13 nature and severity of [a claimant's] impairments, [his] medical history, clinical findings,
 14 diagnosis, treatment prescribed with response, or prognosis" are all considered "other medical
 15 evidence" under the regulations and are not considered medical opinion because they do not
 16 provide perspectives about the claimant's functional limitations and abilities. *See* 20 C.F.R. §
 17 404.1513(a)(c), 81 F.R. 62562.

18 Recently, the Ninth Circuit issued guidance regarding the treatment of physicians' opinions
 19 after the implementation of these revised guidelines. *See Woods v. Kijakazi*, 32 F.4th 785, 2022
 20 U.S. App. LEXIS 10977 (9th Cir. 2022). The Court found that its prior case law requiring that
 21 treating and examining physician's opinions be given particular deference and that opinions be
 22 rejected only for specific and legitimate reasons was irreconcilable with the amended regulations.
 23 *Woods*, 2022 U.S. App. LEXIS 10977, at *14-15. Instead, the Court held, the ALJ must provide
 24 an explanation supported by substantial evidence when rejecting an opinion. *Id.* at *15. The
 25 explanation "must articulate how persuasive it finds all of the medical opinions from each doctor
 26 . . . and explain how it considered the supportability and consistency factors in reaching those
 27 findings." *Id.* (internal citations omitted).

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1 Here, in crafting Plaintiff's residual functional capacity, the ALJ considered the opinions
 2 of Dr. Mark Short and Dr. Lisa Foerster, both consultative examiners who specifically wrote
 3 reports as to Plaintiff's four areas of mental functioning. A.R. 47-48. The ALJ also considered
 4 the prior administrative findings of Disability Determination Services consultants. A.R. 46.³

5 Dr. Mark Short assessed Plaintiff on March 30, 2022. A.R. 1676-1683. He opined that
 6 Plaintiff "appears to retain sufficient cognitive resources to sustain simple employment . . . and
 7 her mental disorder(s) currently appear to consistently impact her functioning to a moderate
 8 degree." A.R. 1681. In terms of Plaintiff's limitations, Dr. Short opined that Plaintiff would have
 9 "moderate difficulty responding consistently and appropriately to work pressure in a work setting
 10 and working in coordination with and in close proximity to others without conflict, distress,
 11 confusion, or distraction. . ." *Id.* He further opined that consistent treatment would help lessen
 12 these symptoms. *Id.*

13 As to Plaintiff's specific areas of functioning, Dr. Short opined that Plaintiff "would
 14 probably be able to consistently understand, and to consistently remember, but not consistently
 15 carry out complex and detailed tasks without special supervision." A.R. 1680. He further opined
 16 that Plaintiff "could probably understand and remember simple and most detailed instructions and
 17 could carry out simple but not detailed tasks without special supervision." *Id.* Dr. Short opined
 18 that Plaintiff would "probably" be unable to sustain attention and concentration for most detailed
 19 and complex tasks without special supervision, but that she could "probably" sustain attention and
 20 concentration for simple tasks. *Id.* Finally, Dr. Short opined that Plaintiff only has a mild difficulty
 21 in interacting with supervisors, peers, and the public and appears able to adhere to basic standards
 22 of neatness and cleanliness. *Id.*

23 The ALJ discussed Dr. Short's opinions at length, including highlighting his conclusions
 24 as to Plaintiff's limitations in each of the four areas of mental functioning. A.R. 47. In evaluating
 25 the weight to give Dr. Short's opinions as to Plaintiff's mental limitations, the ALJ found the
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27 ³ The Court will not discuss at length the ALJ's discussion of the prior administrative
 28 findings, as the parties do not contest any part of his analysis of this evidence. The ALJ found
 these opinions mostly persuasive insofar as the opinions were consistent with the longitudinal
 record as to Plaintiff having moderate mental limitations. A.R. 47.

1 opinion mostly persuasive. *Id.* The ALJ stated that this opinion was mostly persuasive because
 2 some of the opinions Dr. Short proffered about Plaintiff's ability to complete certain tasks were
 3 discussed as "probably," which is not a concrete opinion. *Id.* The ALJ also noted that the record
 4 before him indicates more than a mild social interaction limitation. *Id.* The ALJ concluded that
 5 "insomuch as the . . . limitations correspond to mild-to-moderate mental limitations, they are at
 6 least broadly consistent with the longitudinal record." *Id.*

7 Dr. Lisa Foerster assessed Plaintiff on July 30, 2018. A.R. 572-76. She opined that
 8 Plaintiff "does not have the overall ability to understand, remember, and carry out an extensive
 9 variety of complex instructions..." A.R. 575. She further opined that Plaintiff could understand,
 10 remember, and carry out detailed instructions and simple one-or-two-step instructions. *Id.* Dr.
 11 Foerster opined that Plaintiff could interact appropriately with supervisors and coworkers, but not
 12 with the general public. *Id.* Finally, she assessed that Plaintiff "does not have the ability to
 13 maintain concentration to carry out complex and detailed instructions," but that she does have the
 14 ability to carry out simple instructions. *Id.*

15 In evaluating the opinion evidence provided as to Plaintiff's mental limitations, the ALJ
 16 also discussed the opinion offered by Dr. Lisa Foerster at length. A.R. 48. The ALJ found Dr.
 17 Foerster's opinion to be mostly persuasive. *Id.* In discussing the weight to be afforded to her
 18 opinion, the ALJ highlighted that her opinion as to Plaintiff's interactions with others was
 19 contradicted by the longitudinal record. *Id.* However, the ALJ concluded that "insomuch as Dr.
 20 Foerster's opinion equates to generally moderate mental limitations, it is at least broadly consistent
 21 with the longitudinal record." *Id.*

22 Considering the entire record, the Court finds that substantial evidence supports the ALJ's
 23 determination about the proper weight to afford Dr. Short's opinion as to Plaintiff's mental
 24 limitations. In weighing Dr. Short's opinion, the ALJ specifically highlighted what he found to
 25 be supported by the record before him and what he found consistent with or inconsistent with other
 26 evidence, as required by the Social Security regulations. A.R. 47. The ALJ also discussed the
 27 other evidence in the record he considered, including Plaintiff's own function reports, hearing
 28 testimony, treatment records, and other medical reports. *Id.*

1 Plaintiff's own reports indicate that most of her mental limitations stem from pain and
2 generally reflect an evaluation that Plaintiff can get along with others, does not handle stress well,
3 has some difficulty with instructions and attention span, and can finish tasks. *See, e.g.*, A.R. 441-
4 43, 462-63. Treatment notes consistently report Plaintiff as being cooperative, appropriate in
5 mood and affect, and expressing normal judgment. A.R. 521, 547, 631, 646, 666, 686, 711, 758,
6 854, 862, 871, 874, 902, 935, 960, 980, 1062, 1082, 1117, 1143, 1163, 1181, 1196, 1214, 1230,
7 1255, 1276, 1308, 1667, 1671, 1686, 1688, 1691, 1704. Plaintiff's testimony established that she
8 occasionally has anxiety attacks, has some problems concentrating, and has depression from her
9 bipolar disorder that makes it difficult for her to feel motivated. A.R. 65-67. However, while
10 treatment notes occasionally indicate that Plaintiff has anxiety, the same notes indicate that she
11 has no associated symptomology, displayed oriented, normal thoughts and mood, and that she is
12 medicated with Xanax to control her anxiety. *See, e.g.*, A.R. 952, 1011, 1060, 1319, 1372, 1472-
13 73, 1475, 1479, 1486, 1492-93, 1499, 1506-07, 1512, 1518-19, 1525-26, 1532-33, 1539-40, 1547-
14 48, 1555-56, 1564-65, 1574-75, 1584-85, 1594-95, 1603-04, 1611-12, 1618-19, 1626-27, 1635,
15 1642, 1649, 1667, 1686, 1691, 1696, 1723, 1731, 1737, 1744, 1752, 1759, 1767, 1775, 1783.

16 Considering this evidence alongside the opinion evidence offered by Dr. Mark Short and
17 Dr. Lisa Foerster, the Court finds that it was reasonable for the ALJ to determine that some of the
18 evidence undermined the opinions offered by Dr. Short and, accordingly, afford the opinion mostly
19 persuasive weight. The Court finds that the ALJ appropriately discussed how he considered the
20 supportability and consistency of both Dr. Short's opinion and Dr. Foerster's opinion as required
21 by the new regulations because, for each opinion, the ALJ offered specific reasons that the opinion
22 was or was not supported by and consistent with the longitudinal record. The Court further finds
23 that the ALJ's determination as to Dr. Short's opinion was supported by substantial evidence.
24 Accordingly, Plaintiff is not entitled to remand on the basis that the ALJ did not properly consider
25 and weigh the opinion of Dr. Short.

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1 **III. CONCLUSION**

2 Based on the forgoing, the Court **DENIES** the motion for reversal or remand (Docket No.
3 18) and **GRANTS** the countermotion to affirm (Docket No. 20). The decision below is
4 **AFFIRMED**. The Clerk's Office is instructed to **ENTER FINAL JUDGMENT** accordingly and
5 to **CLOSE** this case.

6 IT IS SO ORDERED.

7 Dated: June 9, 2022

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9 Nancy J. Koppe
10 United States Magistrate Judge

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